No. 92-858

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1992

WILLIAM C. McLEOD II, Petitioner.

v.

FUMIKO I. McLEOD, Respondent.

Petition for a Writ of Certiorari
to the California Court of Appeals
for the Fourth Appellate District, Division Three

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether California courts can, consistent with the Supremacy Clause and due process, invent new procedural rules to circumvent 10 U.S.C. §1408 that specifically details the sole conditions under which state courts may exercise subject matter jurisdiction over the potential military retirement pay of non-California citizens.

PARTIES

The parties are: Petitioner, Lieutenant Colonel William C. McLeod II, U.S.A.F. and Respondent, Fumiko I. McLeod.

Since Petitioner contends California's community property division of the potential military retirement pay pursuant to California Civil Code §4800(a) of active duty military service members who do not consent to division and who are not California citizens violates the supremacy clause of the Federal Constitution, 28 U.S.C. §2403(b) may be applicable, and the Attorney General of the State of California is being served pursuant to Rule 29.4(c) of this court.

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OPINIONS OF THE LOWER COURTS

On September 17, 1990, the trial court determined it had jurisdiction to divide Petitioner's potential military retirement pay as community property, even though Petitioner does not reside in California, is not domiciled in California, and did not consent to California jurisdiction over his potential military retirement pay. The trial court specifically based its finding of jurisdiction on Petitioner's appearance in the action. (Appendix A.)

On May 29, 1992, the Court of Appeal affirmed jurisdiction, but not based upon Petitioner's appearance in the case. Rather, it affirmed jurisdiction based upon implied consent. (Appendix B.)

The Court of Appeal denied rehearing on June 29, 1992. (Appendix C.)

The California Supreme Court denied Review on August 20, 1992. (Appendix D.)

JURISDICTIONAL GROUNDS

Lt. Col. McLeod invokes this court's jurisdiction under 28 U.S.C. §1257(a). He asks the court to determine whether California has subject matter jurisdiction to characterize and divide his potential military retirement pay as community property in violation of 10 U.S.C. §1408(c)(1) when he does not reside in California, is not domiciled in California, and does not consent to California jurisdiction over his potential military retirement pay.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the federal Constitution:

U.S. Const., Art. VI, Cls. 2:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This case also involves 28 U.S.C. §1257(a)

28 U.S.C. §1257(a):

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This case also involves the jurisdictional provisions of the Uniformed Services Former Spouses Protection Act (FUSFSPA), (10 U.S.C. §1408(c)(1) and (c)(4). The statute

is set forth in full in the appendix because of its length. The relevant portion provides:

> "(c) AUTHORITY FOR COURT TO TREAT RETIRED PAY AS PROPERTY OF THE MEMBER AND SPOUSE.--
>
> "(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.
>
> * * * *
>
> "(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of
>
> "(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court,

"(B) his domicile in the territorial jurisdiction of the court, or

"(C) his consent to the jurisdiction of the court.

STATEMENT OF THE CASE

Petitioner, LIEUTENANT COLONEL WILLIAM C. MCLEOD II [Bill], is a career officer on active duty in the United States Air Force. He is domiciled in the State of Colorado. (Court of Appeal Opinion, p. 8, fn. 3; RT Sept 22, 1988, at 21-22 and 139-140.)

Respondent, FUMIKO (ISHII) MCLEOD [Fumiko], is a Japanese naturalized American citizen who established California as her domicile when the parties were stationed in California in the late 1970s. (RT Mar 6-7, 1989, at 91.) The parties were married in Tokyo, Japan, in 1972 while Bill was stationed on Okinawa. (CT 607.)

The parties were transferred to West Germany in 1981. (CT 426.) In May, 1984, Fumiko absconded to California with the children and all of the parties liquid assets. Five days later, on June 4, 1984, she filed a petition for dissolution of marriage. (CT 4.)

Bill wrote several letters to the court objecting to jurisdiction, and the court purported to stay the proceedings pursuant to the Soldiers and Sailors Civil Relief Act. (CT 17-18, 110.) Nevertheless, the court entered an order for child and spousal support and other relief. (CT 110-112.) Fumiko then obtained writs of execution and garnished virtually all of Bill's pay. (CT 37-38, 80, 279.)

Later, the court appointed an attorney to represent Bill. (CT 36.) Bill specifically instructed the attorney not to make

a general appearance. (CT 600.) Nevertheless, the court-appointed attorney filed a response to the petition for dissolution without Bill's signature, knowledge, or consent. (CT 1744.)

Eighteen months after Fumiko took all of the money (approximately $40,000.00) and left Bill in Germany, and after California garnished all of Bill's military pay, he was financially forced to come to California. He had to try to set aside the garnishments so he could live.

At a November 21, 1985 hearing, Fumiko and Bill entered a stipulation concerning interim orders for family support. All other issues were specifically reserved for trial. (CT 162-164.)

During the six years the case was pending for trial, numerous interim proceedings were held, including a change in venue at Fumiko's request. Bill continued to object to jurisdiction. (CT 992.) He raised the jurisdiction issue at every possible opportunity. (CT 658-662.)

On September 28, 1989, five years after Fumiko filed the case, the parties entered into a pre-trial stipulation to retain a private retired judge to hear the case because they could not get a trial date on the crowded calendar. (CT 908.) The Stipulation provided, in relevant part:

> "Parties and Attorneys stipulate to have the entire matter assigned to JAMS - Judge Rutter. Respondent to be fully responsible for that part of the fees for JAMS in connection with the following issues.
>
> * * *
>
> 2. Military pension v. sep. property retainer pay. * * * ." (JAMS is the Judicial Arbitration and

Mediation Service; a private "rent-a-judge" agency; Clerk's Transcript, page 908-909.)

Both parties and their attorneys signed the Stipulation, and the regular trial court judge approved the stipulation as an order of the court. (CT 908.)

Thus, it was understood by the court, counsel, and parties that Bill did not consent to characterization of his potential military retirement pay as community property. Further, he agreed to pay the additional cost of the trial attributable to his claim that the potential military retirement pay is separate property under federal law.

A three day trial was held on September 4, 5, and 9, 1990. Judgment was filed on September 17, 1990. (CT 929-939.) The trial court found personal jurisdiction and jurisdiction to divide Bill's potential military retirement pay as community property based upon Bill's general appearance on November 21, 1985 and stipulation for interim orders. (CT 929-939.)

The Court of Appeal affirmed on May 29, 1992, and denied rehearing on July 2, 1992. The Court of Appeal specifically declined to hold that Bill had an affirmative duty to raise the issue of non-consent. (Opinion, page 9, lines 3-4.) Nevertheless, the Court of Appeal determined Bill consented to division of his potential retirement pay by his lack of responsive filings after Fumiko listed Bill's retirement benefits in a settlement conference statement she filed two and one-half years before trial and before venue was changed at Fumiko's request. (Opinion, page 8-9.)

In California, there is no statute or rule providing failure to brief an issue for a pre-trial settlement conference constitutes consent to jurisdiction. Nor does any prior case

establish this rule. The Court of Appeal did not recite any rule, statute, or case law conferring consent. The Court of Appeal simply invented a new procedural rule, unique to this case, because there was no valid way to uphold the substantive finding of the trial court.

The Court of Appeal denied rehearing on June 29, 1992. The California Supreme Court denied review on August 20, 1992. This petition is being filed within 90 days following the state Supreme Court's denial of review.

ARGUMENT

CALIFORNIA DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER BILL'S POTENTIAL MILITARY RETIREMENT PAY BECAUSE CALIFORNIA IS NOT BILL'S RESIDENCE OR DOMICILE AND HE DOES NOT CONSENT TO JURISDICTION

When state action conflicts with a direct pronouncement of federal law, the state act is invalid, even in domestic relations cases. As the Court pointed out in *Ridgway v. Ridgway*, 454 U.S. 46 (1981):

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, (see *McCarty v. McCarty*, 453 U.S. 210 [101 S.Ct. 2728, 2735, 69 L.Ed.2d 589] (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-594 (1890)), this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in federal rights. . . . **And, specifically, a**

> **state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments**." (emphasis added, *Ridgway*, 454 U.S. at 54-55).

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction, and this has been so from the earliest days of our country. (*McCulloch v. Maryland*, 4 Wheat. 316 (1818).)

Since *McCulloch*, if a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity--and this is true even though the state action in question was taken within a sphere in which the states could otherwise act. (*Free v. Bland*, 369 U.S. 663, 666 (1962).)

In the present case, Congress has specifically defined and limited the conditions under which states may exercise jurisdiction over military retirement pay. Title 10 of U.S.C. Section 1408(c)(4) provides:

> "A court may not treat the disposable retired or retainer pay of a member [as community property] unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court."

Since the appellant in the present case has never resided in California except because of his military assignments, and since he has never been domiciled in California, and since he does not consent, the California courts do not have jurisdiction to treat his military retirement pay as community property.

The Court of Appeal agreed jurisdiction cannot be based upon residence or domicile, so it invented a new way to imply consent. The Court of Appeal found consent to division of the retirement pay, even though Bill objected at every opportunity and the parties stipulated the issue was reserved for trial.

The Court of Appeal found consent. But, it did not address the fact that the stipulation to try the issue was made an order of the trial court.

The Court of Appeal found consent. But, it did not address the fact that Bill paid all of the extra cost of litigating the issue.

The Court of Appeal found consent. But, it did not address the fact that the issue was actually litigated at trial.

The Court of Appeal found consent. But it did not base its factual finding on any statute, rule of court, or decision of any prior case. It simply invented a new rule, for this case only, because Bill had met all of the previously established statutes, rules, and cases.

The appellate court "rule-making" and "fact-finding" in the present case simply denies all process of law, never mind due process.

In the case of *In re Marriage of Hattis*, 196 Cal.App.3d 1162 [242 Cal.Rptr. 410] (1987), a former wife filed complaints to partition her non-resident, former husband's military retirement pay and to modify the child support provisions of a Georgia judgment of dissolution. The Court of Appeal held that the former husband was not subject to the jurisdiction of California in the action to partition his military retirement pay.

According to *Hattis*, *supra*, since the jurisdictional analysis required under 10 U.S.C. §1408(c)(4) for the partition of the retirement pay differs from the constitutional "minimum contacts" approach applicable to the action on the child support order, California did not have jurisdiction to partition the military retirement pay, even though it could order child support.

This was true, even though the retired service member voluntarily appeared in the action. In contrast, in the present case, California forced Bill to appear by garnishing all of his military pay. Nevertheless, appearance does not confer jurisdiction over military retirement pay. (*Hattis*, *supra*.)

The Federal Uniformed Services Former Spouses Protection Act, 10 U.S.C. §1408, provides jurisdiction based only upon residence other than by reason of military assignment, domicile, or consent. Minimum contacts will not sustain jurisdiction when Congress has expressly dictated a more restrictive standard for dividing military retirement pay. (*In re Marriage of Hattis*, 196 Cal.App.3d 1162 [242 Cal.Rptr. 410] (1987); see also *Tarvin v. Tarvin*, 187 Cal.App.3d 56 [232 Cal.Rptr. 13] (1986).)

In the present case, the trial court specifically relied upon a minimum contacts analysis and Bill's purported general appearance in the case. This was reversible error. (*Hattis, supra*.) Bill is not domiciled in California. His past residence in the state was solely a result of military assignment. Further, he did not consent to jurisdiction. To the contrary, he objected to jurisdiction at every reasonable opportunity. Therefore, under 10 U.S.C. §1408(c)(4), California does not have jurisdiction to divide his potential military retirement benefits.

Even if Bill had consented to jurisdiction over the case generally, which he did not, the California court would still **not** have subject matter jurisdiction over his potential military retirement pay. In *Tarvin v. Tarvin*, 187 Cal.App.3d 56 [232 Cal.Rptr. 13] (1986), one of the issues was whether the California court had jurisdiction, based upon past residency, over a non-resident, former husband for purposes of dividing the service member's quasi-community property military retirement pay. The court found FUSFSPA does not provide jurisdiction based upon past residency.

> "[T]he mere fact of past domicile in the state would not subject [the defendant] to its jurisdiction indefinitely, for a past domicile having no relationship to the litigation at hand would not afford a reasonable basis for assertion of jurisdiction." (*Owens v. Superior Court*, 52 Cal.2d 822, 829 [345 P.2d 921] (1959).)

In *Tarvin v. Tarvin*, 187 Cal.App.3d 56 [232 Cal.Rptr. 13] (1986), the only connection between pending litigation and the serviceman was his past residency in California. This was too remote and indirect. The former husband's military retirement rights did not mature during his brief California residency, and his former domicile could not subject him to California's present jurisdiction. (*Tarvin*, *supra*., 187 Cal.App.3d at 60.) Therefore, the service member could appear and object to jurisdiction.

For the same reasons, the trial court did not have jurisdiction to divide Bill's potential military retirement pay in the present case. Bill's only connection to California, other than the fact his wife stole his children and virtually all of his money and fled to California, is his past residency in this state, which was solely due to official orders of the United State Air Force. This is too remote and indirect. (*Tarvin,*

supra., 187 Cal.App.3d at 60.) Therefore, the court lacked subject matter jurisdiction.

In *In re Marriage of Tucker*, 226 Cal.App.3d 1249 [277 Cal.Rptr. 403] (1991), the Court of Appeal confirmed that a service member's consent to jurisdiction over the status of the marriage, community property generally, spousal support, and child custody and support does not confer jurisdiction over military retirement pay within the meaning of 10 U.S.C. §1408. The facts of *Tucker* are remarkably similar to the present case.

As in the present case, the service member in *Tucker* maintained domicile in a different state, but owned a community property house in California. As in the present case, the service member in *Tucker* stipulated, *pendente lite*, to temporary orders concerning custody and support, and he subsequently fully litigated the case. As in the present case, the service member in *Tucker* filed non-resident income tax returns while he was stationed in California, and he objected to subject matter jurisdiction over his military retirement benefits. And, as in the present case, the former spouse in *Tucker* did not argue that the service member's residency due to military assignment in California conferred jurisdiction.

Rather, exactly as in the present case, the former spouse in *Tucker* argued California had jurisdiction over the military retirement pay because the service member consented to jurisdiction based upon his general appearance in the case. The *Tucker* Court of Appeal rejected the argument.

> "[A] member of the military * * * may both agree California has jurisdiction over non-pension issues and at the same time argue California has no power to divide his or her military pension." (*In re Marriage of Tucker*, 226 Cal.App.3d 1249 [277 Cal.Rptr. 403] (1991).)

That is exactly what Bill did in the present case. Therefore, the judgment should have been reversed. In the present case, the trial court did not rely on the purported "consent" found by the Court of Appeal. The trial court simply refused to follow the correct rule of *Hattis*, *Tarvin*, and *Tucker*.

Nevertheless, the Court of Appeal, in its zeal to continue California's tradition of ruling against military members in family law cases, affirmed by inventing a new rule that denies due process and offends the Supremacy Clause.

CONCLUSION

Certiorari should be granted to determine whether an appellate court may establish a new procedural rule that violates due process and offends the Supremacy Clause.

Respectfully Submitted,

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November, 1992.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

In re the marriage of	)	NO. D-29-01-45
Petitioner:	)	
FUMIKO I. MC LEOD	)	
and	)	JUDGMENT ON
Respondent:	)	RESERVED
WILLIAM C. MC LEOD II	)	ISSUES
	)	
	)	

This matter came on for trial on October 4, 5 and 9, 1989, before the Honorable J.E.T. Rutter, Retired, by stipulation of all parties sitting as Judge Pro Tem, on issues reserved after the bifurcation of marriage on September 29, 1989.

Petitioner, FUMIKO ISHII MC LEOD, was present and represented by her attorney PETER H. WERNICKE. Respondent, WILLIAM C. MC LEOD II, was present and represented by his attorney, WILMA E. PRESLEY.

The Court orders as follows:

CUSTODY AND VISITATION:

1. By reference, the Partial Judgment on Reserved Issues of Custody and Visitation, signed on December 15, 1989, and filed on December 15, 1989, attached hereto, is incorporated herein.

CHILD SUPPORT:

2. As and for support of the minor children of the parties, MARGARET COCO MC LEOD, born January 11, 1977, and WILLIAM CARL MC LEOD III, born January 1, 1980, the respondent is ordered to pay to petitioner the sum of $300.00 per month per child, for a total of $600.00 per month, payable one-half on the first and one-half on the fifteen of each month, commencing November 1, 1989. Said child support shall continue to be paid for each child until further order of court, or until the child marries, dies, is emancipated, reaches 19, or reaches 18 and is not a full-time high school student residing with a parent, whichever occurs first.

The Court finds that petitioner's net income is $2,116.00 per month, and respondent's net income is $3,374.00 per month. The Court, in ordering this amount of child support, has taken into consideration the expense to respondent of transporting his children to his duty station, of coming to California to visit them, and his expenses while they are with him for the summer visitation. This order, therefore, assumes and expects that respondent shall pay all such costs and assumes all such expenses. Should he move to a different part of the world, respondent shall have the right to show an increase in transportation costs.

SPOUSAL SUPPORT:

3. The Court reserves jurisdiction over spousal support until January 1, 1997, at which time spousal support shall cease and terminate, and the Court shall lose jurisdiction over spousal support. The Court intends this order to be a termination order and does not permit extension of spousal support by a motion filed prior to date of expiration.

RESTORATION OF NAME:

4. Upon entry of this decree, the Court orders the petitioner resume her name as a hyphenated name, FUMIKO ISHII-MCLEOD.

DIVISION OF PROPERTY:

5. Petitioner shall be awarded as her sole and separate property from the community the following items:

a. Monies taken from community money market fund:	$19,900
b. German bank accounts received:	24,438
c. Received from bank account before separation:	2,900
d. Remaining balance in community checking account:	660
e. Further funds received at separation (Ex. FF)	1,158
Sub-total:	$49,056

Petitioner shall receive the following credits:

Funds returned: rental income $7,811.43 minus $6,314.48 equals a net credit:	(1,497)
Credit for airline tickets:	(2,900)
Net funds taken - petitioner:	$44,659

f. One-half of savings bonds; respondent is ordered to account these bonds to petitioner,and turn over one-half of the bonds to petitioner -0-

g. Petitioner's IRA: 960

The Court will allow credit to petitioner against funds taken: $44,659

LESS living expense credit as follows:

July 1984 - October 1984:	$6,000
November 1984 - February 1985:	4,080
February 1985 - May 1985:	2,940
June 1985 - November 1985:	7,011
Sub-total:	$20,031
PLUS expenses for getting set up in California:	2,500
Deduct support received from Resp.	($18,000)
Total credit to petitioner against funds taken from Germany:	4,531
RECAPITULATION:	44,659
Credit amount to petitioner:	(4,531)
Sub-total:	$40,128

On the sum of $40,128, petitioner is assessed interest from the time petitioner was ordered to deposit the community funds into an interest-bearing account (November 19, 1985) until October 4, 1989, a total of 47 months at ten percent interest per annum:
$4,013 per year, or $334 per month x 47 months: $15,698

TOTAL CHARGE TO PETITIONER MONIES RECEIVED AND INTEREST: $55,826

6. Respondent shall be awarded from the community the following property:

a. Page 5, line 10:	$ 650
b. Capital Preservation Fund:	700

c. Page 13, line 1: (no Cignovich credit)	-0-
d. Page 1, line 13: (Settled, no charge)	-0-
e. Militaria collection:	12,348
f. 1974 Mazda:	150
g. 1971 Van:	250
h. 1978 Mercedes Benz:	-0-
i. 1975 Mercedes Benz:	-0-
j. IRA of respondent:	10,098
k. Family residence, net:	88,385
Stipulated value:	$117,000
LESS: Trust deed balance:	(28,615)
Sub-total	112,581
Credits:(5,200) TOTAL CHARGE TO RESPONDENT:	$107,376

In order to equalize the division of property, $107,376 versus $55,826, Respondent shall pay to petitioner the sum of $25,775, less the following:

$ 138.00	Reimbursement of children's travel
473.00	One-half court reporter's fee
840.00	Portion of JAMS' bill paid by respondent over and above his share
500.00	Stipulated compromise on support arrearages
$1,951.00	

Deduction of this total -- $1,951.00, leaves a balance of $23,824.00. Said sum is due and payable not later than 5:00 p.m., November 15, 1990. However, it shall bear interest at the rate of ten percent per annum from August 15, 1990, until paid. The purpose of delay in the due date is to give the respondent time to refinance the Apple Valley residence. if [sic] respondent elects to refinance the Apple Valley residence in order to pay the petitioner, there shall be deducted from the sum due, one-half of the actual finance charge. If respondent

refinances the residence for an amount larger than the sum due, respondent may charge the petitioner for a proportion of the refinance charge as the sum due bears to the sum borrowed.

In the event respondent fails to pay said sum of $23,824.00 to petitioner by November 15, 1990, he shall lose the refinance option and the residence shall be listed for sale by a broker chosen by the attorneys for the parties. The court reserves jurisdiction over all aspects of the sale, including the listing price, the selection of the broker, the placing of the lock box on the door, disputes about the sale price and the like, and including the jurisdiction to order the Clerk of the Superior Court to execute any documents which any party is unwilling or unable to sign.

In the event the residence is sold, any party making payments unreimbursed by rental income or otherwise, shall be paid from the first proceeds. Thereafter, from the net proceeds of sale, the petitioner shall receive the said sum of $23,824.00, plus any accrued interest. In the event the net proceeds of sale exceed the sum of $88,385, petitioner shall receive, in addition to the figure set forth above, plus interest, one-half of said "excess" in excess of $88,385.00.

Actions pending sale: It appears to the court that, as a result of the parties haggling, the rental management company has been lost. The court, therefore, makes the following order: Effective forthwith, and until sale or the completion of the refinance of the property, Fumiko McLeod shall have the sole management and control of the property, including control of the rents and the obligation to make mortgage payments. The court hereby orders that the tenant may be instructed to forward rental payments directly to petitioner's attorney, Mr. Wernicke, and petitioner shall make all payments upon the property subject to being reimbursed first

from rentals collected and thereafter from the refinance proceeds or sale proceeds, as the case may be. Respondent is enjoined and restrained from contacting the rental company, or the tenant, and the tenant may be so notified. The court concludes that petitioner and her attorney are in a great deal better position to deal with the tenant than the respondent who is out of the state.

7. The following real estate partnerships are community property:

Name	Manager
Rushfair	Guardian
Montebello	Guardian
El Mirador	Guardian
Sale	Guardian
BWP II	Boettchler

and are awarded to both parties. The respondend [sic] is ordered to write to the partnerships and either cause them to be liquified, with any monies due divided equally between the parties, or obtain documentation in order to divide their interest therein and register their interest with said partnerships. Both parties shall cooperate in order to effectuate his divison [sic]. The Court reserves jurisdiction in the event that the division for some reason may not be effected. In the event a division of any of the interests is not effected, the respondent shall continue to manage that interest, but shall account yearly to the petitioner at the time the K1 is received and shall forward copies of all correspondence with the partnership to the petitioner.

8. Furniture, furnishings and personal property shall be awarded to the party in possession of same with the exception that it was stipulated that certain items would be returned from

each party to the other. The court reserves jurisdiction to enforce that stipulation.

MILITARY PENSION

9. The Court finds that the respondent, WILLIAM C. MC LEOD II, is presently a Lt. Colonel in the United States Air Force, Social Security No. 545-60-0157, and has been an active member of said branch of the military every since June, 1965.

The Court finds that the petitioner, FUMIKO I. MC LEOD, and the respondent, WILLIAM C. MC LEOD II, married on March 31, 1972, and separated on May 31, 1984, for a total length of marriage of 12 years, 2 months, or 146 months.

The Court further finds that during the time of April 1, 1981 and up to an including October 19, 1981, the parties temporarily separated for a period of seven months, and thus deducts said seven months from the total time the petitioner is entitled to share in the retirement of the respondent.

The total length of marriage credited to the community is 139 months.

The Court further finds that petitioner proprely [sic] filed for dissolution in the State of California, that in personam jurisdiction existed over the respondent in 1984, at the date of filing the petition.

The Court further finds that on November 23, 1985, the respondent made an appearance and stipulated to certain orders which conferred his consent to this proceeding and all orders resulting thereafter.

For that reason, the Court finds that by his appearance, the respondent has waived any issues with respect to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

The orders made by this Court herein as to the marriage of petitioner, FUMIKO I. MC LEOD and respondent, WILLIAM C. MC LEOD II, Social Security No. 545-60-0157, have been made in full compliane [sic] with the Soldiers' and Sailors' Civil Relief Action of 1940, as amended, 50 USC, App. Sec. 501, et. seq. The Court finds that the retirement accrued during the term of service of respondent, WILLIAM C. MC LEOD II, is community property and divides the same by the following formula: 139 months of marriage divided by the number of months of total service, equals percentage of community interest, divided by two (2), equals percentage interest of petitioner in the retirement net pay after 1408(a)(4) deductions of respondent, WILLIAM C. MC LEOD II.

Said interest shall be directly payable to petitioner, FUMIKO I. MC LEOD, from the United States Air Force upon the actual retirement of respondent, WILLIAM C. MC LEOD II, from the United States Air Force (i.e., respondent begins to receive retirement benefits), or at the earliest possible date under which said retirement benefits could be directly payable to petitioner, and continuing each and every month the respondent receives said benefits.

Petitioner's name/address: FUMIKO I. MCLEOD
479 Springbrook North
Irving, CA 92714

Respondent/Military member ane [sic] and address:
WILLIAM C. MC LEOD II
Social Security No.: 545-60-0157.

The Court retained jurisdiction over the issue of the military retirement pay, to enforce the division herein awarded, including but not limited to, a determination in case here [sic] is a change in law, whether retirement shall be paid out of gross or net pay.

ATTORNEYS' FEES AND COSTS

10. Each party shall bear his or her own attorneys' fees and costs in connection with this proceeding and shall pay the bill incurred with JAMS and the reporter's fee equally by way of the adjustment made in the equalization amounts. This order supersedes the previous Announcement of Intended Decision and other orders because of respondent's refusal to comply with them, and the court's inability to enforce the judgment otherwise.

Provided, however: The Court feels compelled to answer the complaint of petitioner's attorney that the activities of respondent subsequent to the close of evidence have consisted in stalling, refusing to comply with the court's directions, and an attempt to introduce additional evidence, and reargue issues already decided, and requests erroneous and fraudulent orders. While not agreeing with counsel entirely, the court concludes that the complaint has sufficient merit to call for some further award of attorney's fees. Respondent is ordered to pay to petitioner's attorney directly the sum of One Thousand Dollars ($1,000.00) attorneys' fees, which shall be paid out of the refinance proceeds, or proceeds from the sale of the house.

Additional Credit: The court by Minute Order September 22, 1988, ordered that the community reimburse the respondent for the fees of Mary Pedrosi. The court will accept the representation of respondent's counsel that the bill was $1,400.00 and that no such reimbursement has been

made. The court will further assume that the intention of the Minute Order is reimbursement for the bill and not just the cost of typing the report. From the proceeds of sale or refinance of the house therefor, respondent will be reimburse the sum of $1,400.00 before the division of funds (i.e. the community will reimburse the respondent, or if there is a refinance sufficient only to pay off the petitioner, then the amount due to equalize the division of community will be reduced by $700.00.

IT IS SO ORDERED:

Dated: September 17, 1990

/s/ J.E.T. Rutter, Judge of
the Superior Court, Retired
Judge Pro Tem

COURT OF APPEAL-4TH DIST,DIV.3
FILED
MAY 29 1992
Stephen M. Kelly, Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re Marriage of FUMIKO and WILLIAM MCLEOD.	)	G010337
FUMIKO I. MCLEOD, Respondent, v. WILLIAM C. MCLEOD, Appellant.	)	(Super.Ct. No. D290145) OPINION

APPEAL from a judgment of the Superior Court of Orange County, J.E.T. Rutter, Judge. (Retired judge of the superior court sitting under assignment by the chairperson of the Judicial Council.) Affirmed.

Douglas B. Cone for Appellant.

Peter H. Wernicke for Respondent.

William McLeod appeals from the judgment of dissolution of his marriage to Fumiko McLeod, claiming the trial court had no jurisdiction to divide his military retirement pay. He contends the court erroneously based jurisdiction on his general appearance and a traditional "minimum contacts" analysis rather than applying the statutory bases for

jurisdiction under the Federal Uniform Services Former Spouses' Protection Act (10 U.S.C. § 1048) (FUSFSPA). We find the court's jurisdiction was proper under FUSFSPA and affirm.

I

Bill and Fumiko were married in Tokyo in 1972 while Bill was stationed there in the United States Air Force. In 1974, Bill was transferred to California. The parties bought a house in Apple Valley and lived there for seven years, during which time their two children were born. In 1981, Bill was transferred to West Germany. The family moved again, but kept the house as a rental property.

In 1984, Fumiko and the children returned to California. Fumiko filed a petition for dissolution in San Bernardino County on June 4, 1984, and obtained ex parte temporary orders for custody, visitation and support. The property declaration did not list Bill's military retirement benefits as an asset. After Bill was personally served in Germany, he filed an affidavit claiming his right to a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act (50 U.S.C., Appen., § 501 et seq.) (Soldiers' and Sailors' Act).[1] On July 9, at the hearing on the order to show cause re temporary orders, an attorney for Bill made a special appearance requesting a stay under the Soldiers' and Sailors' Act. The court stayed the dissolution proceedings "until such time as the court is petitioned to appoint counsel for [Bill]"; nonetheless, it made temporary orders for custody, visitation and support.

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[1] The Soldiers' and Sailors' Act provides no judgment can be entered against a defendant in the military service until the court appoints an attorney to represent his or her interests (50 U.S.C., Appen., § 520), and that court proceedings shall be stayed if the military service affects the conduct thereof (50 U.S.C., Appen., § 521).

In October the court appointed counsel for Bill for response to Fumiko's request and issued a writ of execution for unpaid temporary support. Bill wrote to the court, asserting it lacked jurisdiction to proceed because of the protection of the Soldiers' and Sailors' Act and objecting to the appointment of an attorney "because it will be next to impossible for him to protect my rights without my presence in court." In January 1985, Bill's appointed counsel made an unsuccessful motion to quash the writ of execution based on the Soldiers' and Sailors' Act and filed a response to the dissolution petition.[2] An at-issue memorandum was filed and the matter was set for trial on July 22, 1985. In August, Bill substituted retained counsel and the trial was continued to November 1985.

Bill filed another motion to quash the writ of execution and to vacate or modify the temporary orders of July 9, 1984. On November 23, 1985, Bill personally appeared for the hearing on the motions. The parties stipulated to certain temporary orders regarding visitation, support and the management of community property and reserved the issue of the validity of the July 9 orders to the time of trial.

Seventeen months passed. The parties disagreed vehemently over visitation and child support and their voluminous items of personal property; the trial was continued several times by agreement. On April 20, 1987, a settlement conference was scheduled, and Fumiko filed a settlement statement which, for the first time, mentioned Bill's military retirement and listed it as a community asset subject to division. The record contains no response by Bill. The settlement conference was unsuccessful and trial was again continued repeatedly by agreement of the parties. In July, Bill

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[2] The response was filed without Bill's authorization and accordingly was not considered a general appearance at the hearing on reserved issues in March 1989, discussed post.

moved for modification of the visitation and child support arrangements; he did not raise an objection to jurisdiction over his military retirement either in his papers or at oral argument.

The parties continued to bicker over visitation and child support payments. In May 1988, venue was changed to Orange County. In November, the matter was bifurcated and the dissolution as to status was granted. Although Bill filed numerous declarations with the court regarding a variety of matters, including one setting forth his objections to California jurisdiction and certain conditions under which he would agree to dissolve the marriage in California, his military retirement was not mentioned.

In March 1989, a hearing was held on the reserved issue of the validity of the July 1984 temporary orders and Bill's rights under the Soldiers' and Sailors' Act. In his supporting points and authorities, Bill for the first time mentioned his military retirement and argued the court had no jurisdiction over it under federal law. The court refused to discuss the retirement issue, however, stating, "I want the record to be real clear, the issue of whether or not the court has jurisdiction over the military pension was not a matter that was reserved in 1985. So that's not a motion that is before the court....[¶] It was never raised until you filed your points and authorities today. But you never made any motion concerning that. I reviewed everything that you have submitted." Bill's counsel concurred with the court's observation.

The court found California had in personam jurisdiction over Bill when the petition was filed in June 1984 based on his joint ownership of real property and bank accounts here and his previous period of residence during which the parties' children were born. The court further found the July 9, 1984, orders were void because the proceedings had been stayed under the Soldiers' and Sailors' Act, but Bill's appearance and stipulation to the court's orders on November 21, 1985, was a general appearance and constituted

Bill's consent to all subsequent proceedings. No arrearages for support accrued between July 9, 1984, and November 23, 1985.

Nothing more was said about the military retirement until trial, which was held seven months later, when both parties briefed the question of the court's jurisdiction over it. The court exercised its jurisdiction over the benefits based on the March 1989 finding of in personam jurisdiction and Bill's general appearance and resultant waiver of issues under the Soldiers' and Sailors' Act. The court found the retirement benefits that accrued during the 139 months of marriage were community property and awarded Fumiko one-half of the community property share, payable upon Bill's actual retirement. The court retained jurisdiction to enforce the division of the benefits, "including but not limited to, a determination in case [t]here is a change of law, whether retirement shall be paid out of gross or net pay."

II

Bill correctly contends in personam jurisdiction and his general appearance were insufficient bases for the trial court to exercise jurisdiction over his military retirement benefits. In McCarty v. McCarty (1981) 453 U.S. 210, the Supreme Court held in the absence of federal legislation, state courts lacked jurisdiction to order division of military retirement benefits as part of a distribution of community property in dissolution proceedings. In response to McCarty, Congress enacted FUSFSPA, which authorizes state courts to treat disposable retired or retainer pay of a member of the military "either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. § 1408(c) (1).)

Congress, however, set forth clear and express jurisdictional limitations, apparently in response to potential "forum-shopping" spouses seeking states with favorable divorce laws but with which the pensioner has had few contacts. (Mansell v. Mansell (1989) 490 U.S. 581, 591. See

also In re Marriage of Hattis (1987) 196 Cal.App.3d 1162, 1167.) "A court may not treat the disposable retired pay of a member... unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court." (10 U.S.C. § 1408(c)(4).) Because Congress has expressly dictated a more restrictive standard, the "minimum contacts" basis for personal jurisdiction under state law will not support a court order dividing federal military pension rights. (In re Marriage of Hattis, supra, 196 Cal.App.3d at p. 1167; Tarvin v. Tarvin (1986) 187 Cal.App.3d 56. But see In re Marriage of Jacobson (1984) 161 Cal.App.3d 465.)

Likewise, a general appearance by a party in a California dissolution action will not by itself confer jurisdiction over that party's military retirement benefits. "[T]he failure to object to California's jurisdiction over all aspects of a divorce cannot be interpreted as an agreement the narrower requirements of FUSFSPA have been satisfied or need not be met. Rather,... a member of the military... may both agree California has jurisdiction over nonpension issues and at the same time argue California has no power to divide his or her military pension." (In re Marriage of Tucker (1991) 226 Cal.App.3d 1249, 1256.)

III

Notwithstanding the foregoing authorities, Fumiko claims Bill's failure to object specifically to the court's jurisdiction over the military retirement benefits constitutes his consent to that jurisdiction under FUSFSPA.[3] We agree.

In re Marriage of Tucker, supra, 226 Cal.App.3d 1249 held a military spouse was not required to object to the court's power over his pension by filing a motion to quash. "Since the

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[3] The parties agree Bill is neither a resident nor a domiciliary of California.

statute was designed to provide protection which is not provided by the due process clause of the federal Constitution, and... applies even where a court has personal jurisdiction over a member of the military, it is more akin to the doctrine of forum non conveniens than to any lack of personal jurisdiction." (Id. at p. 1257.) In finding the military spouse had properly objected so as to negate consent to jurisdiction, however, the Tucker court emphasized that he clearly and consistently "raised the issue at every stage of the proceedings--in his initial conversation with counsel, in the stipulated order and order to show cause and in the response." (Id. at p. 1258.)

Here, Fumiko did not list the military retirement benefits in her property declaration; and we do not suggest that Bill had an affirmative duty to raise the issue. But in contrast to the spouse in Tucker, Bill continued to aggressively litigate the case for over two years after Fumiko listed the benefits as an asset in her settlement statement without mentioning his objection to its division. In our view, this amounts to the consent contemplated by FUSFSPA.

Bill contends his repeated objections to the proceedings under the Soldiers' and Sailors' Act were sufficient to preclude a finding of consent under FUSFSPA. But the Soldiers' and Sailors' Act provides for "the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in [military] service...." (50 U.S.C., Appen., § 510.) These protections, enacted in 1940, are addressed to jurisdiction generally and cannot be interpreted to apply to the specific requirements of FUSFSPA.

IV

Bill complains even if the trial court had power over his retirement benefits, it erred by reserving jurisdiction to effect possible future changes in the law, citing In re Marriage of Bergman (1985) 168 Cal.App.3d 742. The Bergman court stated the trial court could not fail to divide the community interest in the wife's pension and simply retain jurisdiction to

do so when she became eligible to receive benefits. It found, however, that the trial court had made a present division of the community interest in the plan by awarding to each party "[o]ne-half of the community interest in the California State Teachers' Retirement Benefits in [wife's] name" and reserving jurisdiction "to divide said benefits which shall be distributed at the earliest date when [wife] is eligible to draw her pension." (Id. at p. 758.) The order here similarly made a present division of Bill's retirement benefits. Furthermore, recent frequent changes in the law relating to military pensions suggest any prudent practitioner should consider requesting the court's reservation of jurisdiction such as was done here. (See In re Marriage of Walters (1990) 220 Cal.App.3d 1062.)

V

Bill's final contentions attack FUSFSPA itself. He asserts Congress has no power to allow the division of military retirement pay before retirement because it is earned when paid as reduced compensation for current services. But the California Supreme Court has disagreed, holding "'military retirement pay must be realistically viewed as compensation for past, not present, services.'" (Casas v. Thompson (1986) 42 Cal.3d 131, 142, fn. 5, quoting In re Marriage of Fithian (1974) 10 Cal.3d 592, 604.)

Lastly, Bill challenges FUSFSPA's constitutionality, claiming it accomplishes an impermissible taking of a property right that married military personnel had under McCarty. But FUSFSPA has been applied retroactively to the date of the McCarty decision and pre-McCarty law held such benefits to be community property. (In re Marriage of Fithian, supra, 10 Cal.3d 592.) "'[T]he fact is that no case within our memory has received less retroactive application than McCarty.... [F]or most purposes, McCarty not only is not the law but never really was.'" (Casas v. Thompson, supra, 42 Cal.3d at p. 141, quoting Aloy v. Mash (1985) 38 Cal.3d 413, 421-422.) Thus, FUSFSPA did not divest Bill of any property rights.

The judgment is affirmed. Respondent is entitled to costs on appeal.

WALLIN, J.

WE CONCUR:

SILLS, P. J.

SONENSHINE, J.

Court of Appeal-4th Dis.Div. 3
FILED
Jun 29 1992
Deputy Clerk

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division Three

MC LEOD, FUMIKO I.
v.
MC LEOD, WILLIAM C.
IN RE THE MARRIAGE OF MC LEOD
G010337
Orange County No. D-290145

THE COURT:

The petition for rehearing is DENIED.

/s/ WALLIN, J.

We Concur:
/s/ SILLS, P.J.
SONENSHINE, J.

cc: Orange County Clerk
All Counsel

APPENDIX C

SUPREME COURT
FILED
AUG 20 1992
Robert Wandruff Clerk

Fourth Appellate District, Division Three, No. G010337
S027587

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re the Marriage of FUMIKO AND WILLIAM MCLEOD
FUMIKO I. MCLEOD, Respondent
v.
WILLIAM C. MCLEOD, Appellant

Appellant's petition for review DENIED.

Baxter, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

APPENDIX D

TITLE 10, U.S.C.A. §1408

§1408. Payment of retired pay in compliance with court orders

(a) DEFINITIONS.-- IN THIS SECTION:

(1) The term "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required

by law in order to receive compensation under title 5 or title 38;";

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term 'retired pay' includes retainer pay.

(b) EFFECTIVE SERVICE OF PROCESS.-- FOR THE PURPOSES OF THIS SECTION--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is

personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the

Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) AUTHORITY FOR COURT TO TREAT RETIRED PAT AS PROPERTY OF THE MEMBER AND SPOUSE.--

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any

proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of

(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court,

(B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) PAYMENTS BY SECRETARY CONCERNED TO SPOUSE OR FORMER SPOUSE.--

(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) LIMITATIONS.--

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders

on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the

maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) IMMUNITY OF OFFICERS AND EMPLOYEES OF UNITED STATES.--

(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) NOTICE TO MEMBER OF SERVICE OF COURT ORDER ON SECRETARY CONCERNED.--

A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) REGULATIONS.--

The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

California Civil Code §4800(a). Division of Community Estate.

(a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this section, the court shall, either in its judgment of dissolution of marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally. For purposes of making this division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community estate of the parties in an equitable manner.

For the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with subdivision (c).

As used in this section, "community estate" includes both the community and quasi-community assets and liabilities of the parties.

Supreme Court, U.S.
FILED
DEC 17 1992
OFFICE OF THE CLERK

No. 92-858

In The

Supreme Court of the United States

October Term, 1992

WILLIAM C. McLEOD II,

Petitioner,

v.

FUMIKO I. McLEOD,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeals For The Fourth Appellate District, Division Three

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. WHETHER IT IS ERROR BY THE CALIFORNIA COURT TO DIVIDE THE MILITARY PENSION BETWEEN SPOUSES IN ACCORDANCE WITH STATE LAW, WHEN THE ISSUE OF THE COMMUNITY INTEREST IN THE MILITARY PENSION RIGHTS OF HUSBAND WAS RAISED BY THE WIFE, AND NO OBJECTION WAS MADE BY THE HUSBAND, THE MILITARY MEMBER, TO THE DIVISION OF THE RETIREMENT BENEFITS WHILE HE AGGRESSIVELY LITIGATED THE ISSUES OF THE DISSOLUTION FOR OVER TWO YEARS AFTER THE MILITARY PENSION ISSUE WAS RAISED.

PARTIES

All parties to the proceeding in the court whose judgment Petitioner seeks to review appear on the caption set forth on the cover of this brief.

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I.

RESTATEMENT OF THE CASE

Petitioner, WILLIAM C. McLEOD, II ("Bill"), is an officer in the United States Air Force. Respondent, FUMIKO ISHII, aka FUMIKO I. McLEOD ("Fumiko"), is a Japanese naturalized American citizen who established California as her domicile when the parties were stationed in California in the late 1970's. The parties were married in Tokyo, Japan, on March 31, 1972.

In 1974, Bill was transferred by the Air Force to California. The parties bought a house in Apple Valley, California, and lived there for seven years, during which time their two children, Margaret McLeod and William Carl McLeod, III, were born (CT 14). In 1981, Bill was transferred to West Germany. The family moved to West Germany, however, retained the home in Apple Valley. In May, 1984, as a result of repeated physical abuse by Bill (CT 426, 427, 613), Fumiko returned to California, together with the children, and on June 4, 1984, filed a Petition for dissolution of marriage, together with an Order to Show Cause, requesting child custody, child support, spousal support, attorney's fees, and restraining orders, which was personally served on Bill in Germany.

Bill filed an affidavit with the court, requesting therein a stay pursuant to the Soldiers' and Sailors' Relief Act. The Court ordered the matter stayed until such time as the court is petitioned to appoint counsel for respondent. The court, however, ordered temporary custody of the children of the marriage to Fumiko and set spousal and child support, respectively.

On October 16, 1984, Fumiko petitioned the court to appoint an attorney to represent the respondent (CT 34), and the court appointed an attorney to represent the respondent in this matter. Due to Bill's complete failure to obey any of the court orders regarding support of the minor children and of Fumiko, a Writ of Execution was issued, and an Application for Earnings Withholding Order was filed. On January 30, 1985, the attorney for Bill filed a Response, making no objections therein to any lack of jurisdiction of the court over any of the parties' assets (CT 60).

On December 28, 1984, Bill, through his attorney, moved the court for an order to show cause to quash the writ of execution and the wage assignment heretofore issued. The motion was based on the allegation that the orders heretofore made by the court were in violation of the Soldiers' and Sailors' Relief Act. On March 5, 1985, the court denied the motion.

An at-issue memorandum was filed, and the matter was set for trial on July 22, 1985. Bill continued the trial date and hired new counsel of his choice. The trial was set for November, 1985.

Bill filed another motion to quash the writ of execution and to vacate or modify the temporary orders of July 9, 1984. On November 23, 1985, Bill personally appeared for the hearing on the motions. Both parties stipulated at that time to certain temporary orders regarding visitation, support and the management of community property, and reserved the issue of the validity of the July 9, 1984 orders to the time of trial. Bill did not object to the jurisdiction of the court in the stipulation regarding his

military pension. (CT 172-175). In the stipulation of November 21, 1985, the court reserved only one issue regarding its jurisdiction, and that was the validity of the pendite lite order, which was issued July 9, 1984.

The litigation went unabated for seventeen months. The parties disagreed over visitation and child support and their voluminous items of personal property; the trial was continued several times by agreement. On April 20, 1987, a settlement conference was scheduled. Fumiko filed a settlement statement which, for the first time, mentioned Bill's military retirement, listing it as a community asset subject to division by the Court under California law. Bill did not file any response nor did he object (Petitioner's Appendix B, page 3).

The settlement conference was unsuccessful, and trial was again continued repeatedly by agreement of the parties.

In July, 1987, Bill moved for a modification of the visitation and child support order; he did not raise any objection to jurisdiction over his military retirement, either in his moving papers or at the time of oral argument.

The parties continued to disagree over visitation and child support payments. In May, 1988, upon motion by Fumiko, venue was changed to Orange County Superior Court. In November, 1988, the matter was bifurcated, and the dissolution as to status was granted. Although Bill filed numerous declarations with the court regarding a variety of matters, he never objected to jurisdiction over his military retirement.

In March, 1989, a hearing was held on the only reserved issue, that being the validity of the July, 1984 temporary orders and Bill's rights under the Soldiers' and Sailors' Relief Act. In his supporting points and authorities, Bill, for the first time in these five years of ongoing litigation, mentioned his military retirement and argued that the court had no jurisdiction over the issue under federal law. The court refused to discuss the retirement issue, however, stating, " 'I want the record to be real clear, the issue of whether or not the court has jurisdiction over the military pension was not a matter that was reserved in 1985. So that's not a motion that is before the court . . . It was never raised until you filed your points and authorities today. But you never made any motion concerning that. I have reviewed everything that you have submitted.' Bill's counsel concurred with the court's observation." (Court of Appeal Opinion, Pet.App. B, page 4)

The court ruled that petitioner properly filed for dissolution in the State of California, that in personam jurisdiction existed over the respondent in 1984, at the date of filing of the petition, based on his joint ownership of real property and bank accounts in California and his previous period of residence during which the parties' children were born. The court found further that the July 9, 1984, orders were void because the proceedings had been stayed under the Soldiers' and Sailors' Act, but Bill's appearance and stipulation to the court's orders in November, 1985, was a general appearance and constituted Bill's consent to all subsequent proceedings. He stipulated to certain orders, which conferred his consent to this proceeding and all orders resulting thereafter.

On September 26, 1989, the matter was assigned to trial, by stipulation, to Judicial Arbitration. By stipulation, the Honorable J.E.T. Rutter was to act as Judge Pro Tem. Bill insisted, despite the prior ruling of the court that he had failed to reserve jurisdiction over his military pension, to bring up his military pension at trial. Fumiko did not wish to pay the private arbitration judge for time spent on an issue that she believed was already adjudicated. Thus, the parties agreed to allocate the cost in the following stipulation:

> "Parties and attorneys stipulate to have the entire matter assigned to JAMS – Judge Rutter. Respondent to be fully responsible for that part of the fees for JAMS in connection with the following issues: 1. Custody, child support, spousal support; 2. Military pension v. sep. property retainer pay; 3. Residence in Apple Valley; 4. Division of property and reimbursement, characterization: Sep. v. comm. property, tax issue, division of community debts, cost of shipping personal property, attorneys fees and cost incurred. The following issues shall be decided and each party shall bear the cost in connection with said issues due JAMS as the court may decide: 1. Furniture and Furnishings; 2. Military collection; and 3. Tracing bank accounts . . . "

Both parties and their attorneys signed the stipulation. The court approved the stipulation, making it an order of the court.

(The stipulation is attached as Respondent's Appendix A)

This issue was not raised by Bill in his statement on appeal. Only once a decision was made by the Appellate Court did Bill raise the issue for the first time in his Petition for Rehearing, which was denied.

The matter was tried in September, 1990, and the court found personal jurisdiction and jurisdiction to divide the military retirement benefits because Bill failed to lodge an objection to the jurisdiction of the court to divide the benefits by reason that the issue was raised by Fumiko for the first time on April 20, 1987, and not objected to by Bill until March, 1989, when he raised the issue in response to a hearing, some two years later.

The Court of Appeal affirmed on May 29, 1992, and denied rehearing on July 2, 1992. The court determined that, while Bill did not have an affirmative duty to raise the issue of non-consent over his military pension, . . . "but in contrast to the spouse in *Tucker*, Bill continued to aggressively litigate the case for over *two years* after Fumiko listed the benefits as an asset in her settlement statement without mentioning his objection to its division. In our view, this amounts to the consent contemplated by FUSFSPA." (Court of Appeal Opinion, p. 9).

II.

ARGUMENT

A. BILL CONSENTED TO THE JURISDICTION OF THE COURT

No contention is made by Respondent Fumiko that the Petitioner was domiciled in California or resided in California at the time of the filing of the dissolution. Her sole contention is that Petitioner consented to the jurisdiction of the court. Petitioner cites *In re Marriage of Tucker* (1991), 226 CA.3d 1249, 277 Cal.Rptr. 43, as a case which is remarkably similar to the present case. The service member in *Tucker* maintained a domicile in a different state, but owned a community property house in California. And, the service member *Tucker* stipulated, pendente lite, to temporary orders concerning custody and support, and he subsequently fully litigated the case. The Court refused to divide the military pension and declared it had no jurisdiction.

However, the analogy ends here.

At all stages of the proceeding, Mr. Tucker raised an objection. At the first appearance on November 29, 1989, where Mr. Tucker entered into a stipulation and order to show cause, which temporarily awarded physical and legal custody of their children to the wife and which provided her $500 a month in child and spousal support, the stipulation stated, "Jurisdiction question over retired pay reserved." (*Tucker, supra,* p. 1252).

Thereafter, Mr. Tucker filed a Response to the Petition on January 10, 1989. The Response asked the Superior Court to confirm Mr. Tucker's military retirement pay as

his separate property, to make a declaration regarding the parties' community and quasi-community property, including proceeds from the sale of the parties' California residence, to award joint legal and physical custody of the parties' children, and to make an award of child support. However, the Response clearly set forth "Respondent's military retirement pay not subject to California jurisdiction – Please see declaration of Fletcher S. Tucker incorporated herein." (*Tucker, supra,* page 1253)

Tucker, supra, page 1255, discusses a service member's right under FUSFSPA, whether a service member who consents to the jurisdiction of the trial court regarding property rights, child custody, and support issues, has also consented to the jurisdiction of the trial court within the meaning of FUSFSPA. Citing *In re Marriage of Hattis* (1987), 196 CA.3d 1162, the court in *Tucker* states, on page 1256:

> "A member of the military such as Fletcher may both agree California has jurisdiction over non-pension issues and at the same time argue California has no power to divide his or her military pension."

And on page 1258, the court continues:

> "Having determined Fletcher could raise his FUSFSPA defense while tendering other issues to the trial court, and do so in his response to Classie's petition, we have little doubt his response in fact preserved the defense. As the record indicates, Fletcher's counsel raised the issue at every stage of the proceedings – in his initial conversation with counsel, in the stipulated order and order to show cause, and in the response. The fact that Fletcher's response also

> asked the trial court to confirm the retirement benefits as his separate property must be read in conjunction with his repeated and unequivocable reliance on FUSFSPA. Seen in that light, we interpret the request for confirmation as a conditional request made only in the event the FUSFSPA defense was not successful."

In the present case, neither Petitioner's Response, nor the stipulation he entered into with his new counsel on November 21, 1985, nor any document thereafter, set forth these objections to the jurisdiction over the military retainer pay by the California court.

During the many years of litigation, Petitioner never attempted to amend his Response, to set forth, as Mr. Tucker did, that the jurisdiction over his retirement pay is reserved; nor did he reserve in his stipulation, filed November 21, 1985, an objection to the court's jurisdiction over his retirement pay.

All Petitioner ever raised was an objection under the Soldiers' and Sailors' Relief Act, stating that he could not proceed in court by reason of his absence from the court and his membership in the military service. Even that objection was abandoned after the stipulation on November 21, 1985 was entered.

Petitioner contends that his repeated objections to the proceedings under the Soldiers' and Sailors' Act were sufficient to preclude a finding of consent under FUSFSPA. But the Soldiers' and Sailors' Act provides for the "temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in (military) service . . . " (50 U.S.C., Appen., 510).

These protections, enacted in 1940, are addressed to jurisdiction generally and cannot be interpreted to apply to the specific requirements of FUSFSPA.

In *In re Marriage of Lopez* (1981), 115 CA.3d 776, 781, 173 Cal.Rptr. 718, the court discusses the Soldiers' and Sailors' Relief Act and its effect on court orders:

> " . . . The Supreme Court, in summarizing and applying the pertinent provisions of the Act, stated: 'Section 520 provides that if there is a default of appearance by the defendant in any proceeding, plaintiff shall file an affidavit showing that the defendant is not in the military service. If such affidavit cannot be filed, plaintiff must file an affidavit showing that the defendant is in the military service, or that plaintiff is unable to determine whether or not the defendant is in such service. If an affidavit cannot be made showing that the defendant is not in the service, the court shall not enter the entry of judgment without appointing an attorney to represent defendant and protect his interests . . . "

On page 782, the court in *Lopez* states:

> "The bounds of judicial discretion with respect to the Soldiers' and Sailors' Relief Act have been explored by the United States Supreme Court in *Boone v. Lightner* (1943), 319 U.S. 561, wherein the court observed: 'The Soldiers' and Sailors' Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result

> from absence, or absence results from the service. Absence when one's rights or liabilities are being adjudged is usually prima facia prejudicial. But in some few cases, absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.' "

Reviewing the record, it is clear that Petitioner objected to being absent in the court proceeding in 1984, that Respondent moved promptly to have an attorney appointed for him, and that an attorney was appointed for him who acted to protect his rights. However, reviewing the objections Petitioner filed with the court, nothing challenges the jurisdiction of the court with respect to jurisdiction over his military pension, and Petitioner's contention that he did not consent to the jurisdiction of the court by reason that he filed objections requesting his rights under the Soldiers' and Sailors' Relief Act in the year 1984 do not amount to a challenge of the court's jurisdiction over Petitioner's military retirement.

III.

CONCLUSION

After the issue of the military pension rights were properly raised by Respondent, Petitioner failed for some two years of vigorous litigation to object to California's jurisdiction over his military pension rights. Petitioner asserts that he objected under the Soldiers' and Sailors' Act to jurisdiction. However, the Act does not address this issue. Thus, Petitioner presents nothing to warrant a

grant of certiorari, and the Court should thus deny the petition.

DATED: December 17, 1992.

Respectfully submitted,

PETER H. WERNICKE
Attorney for Respondent

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APPENDIX A

STIPULATION

(Filed September 26, 1989)

Case No. D-29-01-45 Fumiko I. McLeod and William C. McLeod II

9-26-89, p.m., Dept. 10

Petitioner/wife present represented by Atty. Peter Wernicke
Respondent/husband present represented by Atty. Wilma Presley

THE PARTIES HEREBY STIPULATE AND AGREE that

X OTHER:

Parties and attorneys stipulate to have the entire matter assigned to JAMS – Judge Rutter. Respondent to be fully responsible for that part of the fees for JAMS in connection with the following issues: 1. Custody, child support, spousal support; 2. Military pension v. sep. property retainer pay; 3. Residence in Apple Valley; 4. Division of property and reimbursement, characterization: Sep. v. comm. property, tax issue, division of com. debts, cost of shipping personal property, attorneys fees and cost incurred.

The following issues shall be decided and each party shall bear the cost in connection with said issues due JAMS as the court may decide: 1. Furniture and Furnishings; 2. Military collection; and 3. Tracing bank accounts. parties to pay each one half in advance. Husband shall advance the cost of the court reporter without prejudice.

Ret. Judge Rutter shall act as Judge Pro Tem.

/s/ Wilma Presley
/s/ William C. McLeod II
/s/ Peter Wernicke
/s/ Fumiko Ishii McLeod

IT IS SO ORDERED ON THE 26TH DAY OF SEPTEMBER, 1989.

/s/ Robert D. Monarch
Judge of the Superior Court